BOARD OF APPEALS CASE NO. 4702 & 4913	*	**BEFORE THE**
APPLICANT: Maryland Reclamation Associates	*	**ZONING HEARING EXAMINER**
REQUEST: Appeal of Administrative Decision/ Interpretation whether the requirements of Section 267-40.1 pertain to the subject parcel; Gravel Hill Road, Havre de Grace	*	**OF HARFORD COUNTY**
	*	**Hearing Advertised Aegis: 11/29/00 & 12/6/00 Record: 12/1/00 & 12/8/00**
HEARING DATES: 1/22/01; 1/29/01; 2/5/01; 2/12/01; 3/28/01; 5/23/01; 6/11/01; 8/20/01; 8/27/01; 9/10/01 & 10/1/01	*	

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Maryland Reclamation Associates, Inc. ("MRA"), pursuant to Harford County Code Section 267-7, on March 7, 1999, appealed an interpretation of the Zoning Administrator, dated February 18, 1997, and the denial (dated February 22, 1999), of a request by the Applicant for a zoning certificate, dated December 10, 1998. Consolidated in this appeal is also the Applicant's appeal of an October 4, 2000 interpretation of the Zoning Administrator.

The subject parcel is located on the south side of Gravel Hill Road, south of MD Route 155, east of MD Route 462, and is more particularly identified on Tax Map 44, Grids 2A/2B, Parcels 439 and 457. The property consists of 68.33± acres, is zoned AG Agricultural, and is entirely within the Second Election District.

I. SUMMARY OF TESTIMONY

The testimony began with that of Richard Schafer, president of the property owner, MRA. He testified in his capacity as owner of the property and the Applicant in both combined cases. He stated that he purchased the property in 1991; approximately 55 acres lying in the southeast part of the County on Gravel Hill Road in Havre de Grace. He stated that he planned to operate a rubble landfill on the property and that MRA paid seven hundred and thirty two thousand, five hundred dollars ($732,500.00) for the parcel.

During his direct and cross-examination, he explained that he had some discussion with County and State officials concerning the inclusion of the MRA site in the County's Solid Waste Management Plan beginning in late summer or early fall of 1989. Thereafter, according to the witness, numerous discussions and work sessions took place between MRA, MRA's engineers and County officials. The Gravel Hill site was included in the Harford County Solid Waste Management Plan by the County Council's affirmative vote on November 14, 1989. According to the witness, this approval was the linchpin upon which MRA based its decision to purchase the property. In fact, the loan obtained for the purchase of the property, according to Schafer, was conditioned upon the ability of the debtor, MRA, to convert the parcel to a rubble landfill (Exhibit E-2, page 818).

Schafer went on to state that the State of Maryland issued a Phase I approval for the operation and MRA thereafter proceeded with Phase II and Phase II engineering in order to complete the process. In total, MRA claims to have spent in excess of three hundred and fifty thousand dollars ($350,000.00) on Phase I, II and III engineering work. Schafer stated that the Maryland Department of the Environment in February, 1992 issued rubble landfill permits to MRA and further, that MRA applied for but has never been issued a grading permit for the site. According to the witness, Harford County's passage of Bill 91-10 acted to halt all further progress by MRA in proceeding to obtain all necessary permits to operate a rubble landfill on the subject site.

Upon cross examination, the witness stated that the surface mining permit obtained by MRA was very different than a rubble landfill permit and, in fact, the industrial waste permit only applied to a very limited portion of the entire property. Mr. Schafer recalled two public hearings regarding the inclusion of the site within the Solid Waste Management Plan. He recalled the hearing room being packed to overflow with citizens in opposition to the inclusion of this site within the Harford County Solid Waste Management Plan. The witness also recalled testimony of many of these witnesses regarding potential noise, dust, well water issues, truck traffic, and very strong citizen opposition and the concern of certain Council Members which was expressed to him prior to his purchase of the property, during the two hearings held by the Council and for many months thereafter.

He admitted that MRA was well aware of strong citizen opposition to its request to operate a rubble landfill on this site even before they purchased the property. Lastly, the witness stated that the Harford County Bill 91-10 which he claims to have operated to stop MRA's further use of this parcel was actually passed 11 months prior to the date upon which MRA obtained its permit from the Maryland Department of the Environment, which was issued on February 28, 1992, according to the witness.

The next witness to be called by the Applicant was Thomas F. Smith. He explained his prior position as the Director of the Department of Public Works for Harford County from 1987 until 1991. He explained his duties as the Director and his knowledge of the MRA site proposal. He stated that he was familiar with the process of amending and updating the County's Solid Waste Management Plan. He further testified that the County was, at the time MRA sought inclusion into the Solid Waste Management Plan, in support of the inclusion of the MRA site. Mr. Smith explained that the County requested that MRA reserve one cell in its rubble landfill operation for the removal of asbestos and that the County and the Council imposed 27 conditions on the property. He also explained the grading permit process with the County during 1989-1990 and indicated that some of the processes changed during those years. The witness indicated that the grading permit, applied for by MRA, had been reviewed by each agency required to review it, and that it had been signed by everyone except then County Executive, Eileen Rehrmann. He admitted that he had never experienced any other permit that was halted at that stage.

During cross-examination, Mr. Smith stated that the State of Maryland required Harford County to handle its own asbestos removal and disposal within the County itself. The witness further stated that the County was supportive of the MRA inclusion in the Solid Waste Management Plan even if there were no asbestos issue and even if MRA has no cell reserved for asbestos removal. He also stated, on cross-examination, that he had met personally with Mr. Schafer only on one occasion and did not know if Mr. Schafer had actually purchased the property before that meeting or after.

The Applicant next called Gerald Wolff to testify on behalf of MRA. Mr. Wolff is a professional land surveyor. He testified to the grading permit process in the County as he knew it during the early 1990's. He stated that generally if there were an issue with the permit application, the engineer would be called to make the changes or adjustment. He further testified that he did not work for Mr. Schafer or MRA before 1995 and that he was not the engineer who prepared the grading permit application.

Next, John L. Wirth testified that he was the engineer with Morris and Ritchie, who were involved with the preparation of the Phase I study for the siting of a landfill at the Gravel Hill location. He further stated that he started working on the project sometime in September 1989 and concluded his work for Mr. Schafer and MRA sometime in 1991. He further testified that during 1990 and 1991 he continued on the Phase II and Phase III work for the rubble landfill. The witness indicated that in order for MRA to gain approval for inclusion in the Harford County Solid Waste Management Plan, certain buffer requirements had to be met. The witness prepared the plans submitted as part of the approval of MRA's site in the Solid Waste Management Plan and no agency of either the State or County ever notified MRA that the planned buffers were inadequate. He stated that the MRA site could not meet the new buffer requirements enacted by Bill 91-10. He testified against the bill at the Council meetings on behalf of the Harford County Contractors' Association. The witness stated that he was aware that Bill 91-10 was enacted as "emergency legislation" and stated that, in his opinion, the emergency was to stop MRA from operating its landfill. The witness also stated that he was not aware of any other issues with other landfills at the time of enactment of Bill 91-10.

Arden Holdredge McClune was called to testify by the Applicant. Ms. McClune was the Chief of Current Planning for Harford County from approximately 1988 until 1995, when she became Director of the Department of Planning and Zoning. She explained the permitting process in the County for grading permits during that time frame. Mrs. McClune indicated that the role of the Department of Planning and Zoning in review of the grading permit applied for by MRA or any other applicant, would be to evaluate the impact of the proposed use on the Zoning Code, the Natural Resource District, and the Critical Area.

This review would include wetland delineation evaluation, location and impact to stream and wetland buffers and flood plain location and impacts. Mrs. McClune agreed that she authored the letter dated November 18, 1997, which responded to MRA's request for interpretation dated November 15, 1996. The witness stated that the church located close to the rubble landfill received its designation as a historical site in 1995.

Robert S. Lynch was then called to testify on behalf of the Applicant. He testified as an expert in land use and zoning issues and indicated he had served as past Director of Planning and Zoning in Harford County. He stated that he was familiar with the MRA property and that he had visited the property. The witness described the site as a "moonscape' exhibiting numerous mounds and pits where prior mining had taken place. He testified that mining had occurred in the past on approximately seven acres of the overall site. He further testified that he was aware that the only rubble allowed to be dumped on-site under an earlier permit was for the owner's generated rubble. On direct examination, he testified that the only economically beneficial value of the property is as a rubble landfill. He opined that the property would have to be reclaimed in order to be used for other facilities than a rubble landfill.

The last witness to testify for the Applicant was Peter Bergmann. He testified as to the wetlands delineation that he either participated in or supervised on the MRA site in the early 1990's while employed with Geo-Technology Associates, Inc. ("GTA"). He stated that he prepared a wetland delineation for the site for the Phase II presentation to the Maryland Department of the Environment (MDE) and the County. On cross-examination, Mr. Bergmann further testified that the wetland delineation that he had prepared was not completed until July 11, 1991, not 1989 as he previously had testified.

Anthony McClune then presented the Department of Planning and Zoning's case through initial questioning by the Hearing Examiner. Mr. McClune explained the background of the two zoning cases and the relief requested and issues presented by the Applicant. He testified as to the surrounding community, the location of the St. James A.M.E. Church and cemetery in relation to the proposed rubble landfill and the residential area known as Webster Village. He further stated that the cemetery is a County landmark.

Mr. McClune briefly outlined the requirements of Bill 91-10 and the provisions that were established with that legislation. He also indicated that the legislation provided for grand-fathering language to the effect that if a property has obtained a refuse disposal permit from the State prior to February 12, 1992 and contained a minimum of 100 acres, Bill 91-10 would not apply. He stated that this property comprised approximately 68 acres (the 55-acre parcel and the 13-acre parcel) and did not obtain the refuse disposal permit from the State until February 1992.

He continued to explain the County's position that Section 267-40.1 (Bill 91-10), did apply to MRA's property. Mr. McClune also stated that the Department ultimately answered the five questions presented by Applicant in the December 10, 1998 letter to the Department of Planning and Zoning. Mr. McClune then explained that the County denied MRA's request for a zoning certificate because the request did not comply with the standards of Sections 267-40.1, 267-28C, 267-28D(4), and the Natural Resource District provisions contained in Section 267-41, all of the Harford County Code, as amended.

Mr. McClune further testified as to the physical and topographical conditions and constraints upon the property and compared the existing property to the conditions that would exist if the property were utilized as a rubble landfill. He explained about the grading that was necessary, the forestation that would significantly change and the finished elevation of the property which appeared to be substantial. Mr. McClune proceeded to use the overlays and base maps that had been introduced previously to show various features of the proposed landfill in comparison to the existing conditions. He explained the proposed landfill cells, the NRD District and the buffer issues that were involved. His testimony also indicated how certain provisions in the Zoning Code applied to the property and further how the MRA site was not in compliance with these provisions. He pointed out the proposed limits of disturbance and the stream buffer in the Natural Resource District portion of the property.

Mr. McClune concluded his presentation, asking that the Hearing Examiner uphold the Department of Planning and Zoning's decision that Section 267-40.1 is applicable to the MRA site; that MRA fails to meet the requirements of Sections 267-40.1, 267-28C, 267-28D(4) and 267-41. Mr. McClune further stated that the site did not have a valid non-conforming use to operate a rubble landfill and requested that the denial of the zoning certificate be approved.

Subsequently, MRA, the County and the protestants all presented questions to Mr. McClune. He explained about the adoption of Bill 91-10 and that it was enacted as emergency legislation. In addressing why this was enacted as an emergency piece of legislation, Mr. McClune described other parcels that were seeking landfill status, including Harford Sands (also known as Fort Hoyle) and Oak Avenue. He stated that the property did have an industrial waste permit that was issued by the State. That permit was for owner generated waste only and was very limited in size. He further testified that the mining permit that had been issued for the property was also very limited in size; namely, only a few of the 68 acres. The witness indicated that he did observe, during a visit to the site, a few mounds of debris that he characterized as a couple of dump truck loads. He also explained why the County did not consider that the property had a non-conforming use to operate as a rubble landfill. (Transcript, Vol. VI, pp. 50-134.)

After Mr. McClune presented the Department of Planning and Zoning's position, the County initiated its case through the testimony of Arden Holdredge McClune and Milton Davenport. Ms. McClune explained her past and current position as an employee of Harford County. She described her observations on the two occasions that she visited the MRA site, once in 2000 and once again 2001. She explained that the site was mostly wooded, there was an area that was previously mined but no evidence of any extraction activity for a number of years. There were a few piles of construction debris and clean fill that were not there on her visit two years prior to the May 2001 visit. Ms. McClune then described what she observed on the aerial photographs in evidence. She testified that the photographs depicted a small area of mining activity.

She further explained that only a small portion of the property had been mined since the introduction of mining permits and maybe a small portion even prior to the 1977 permit. Ms. McClune also testified that she believes there were many other uses of the property where available as a permitted use and others that could be allowed by special exception. According to the witness, some of these uses could include: construction services and suppliers, open space, parkland, residential or institutional uses, golf driving range, shooting range. She also disagreed with earlier testimony that the property needed to be reclaimed through rubble. Ms. McClune acknowledged that MRA had an industrial waste permit, and she explained what is covered under an industrial waste permit. According to the witness, an industrial waste permit allows clean type material from the property owner to be disposed on the property but not material from anyone else. She also stated that MRA did obtain a rubble permit but that it was obtained from the State after the effective date of Bill 91-10 and was subject to local zoning laws. Ms. McClune also testified about her knowledge of the operation of Harford Sands, Spencer's, and Oak Avenue rubble landfills. She testified that Spencer's and Oak Avenue were existing rubble landfills before the effective date of Bill 91-10, but that Harford Sands was not. Harford Sands has not yet operated as a rubble landfill.

Ms. McClune further stated that during the time that Bill 91-10 was before the County Council, and even prior to that time from around 1988, there were citizen protests surrounding the Oak Avenue Rubble Landfill and the Harford Sands Rubble Landfill. She also testified that Bill 91-10 would apply to any rubble landfill not operational before the effective date of the legislation. She testified about the issues concerning the communities including concerns regarding noise, traffic, dust, vermin and height of fill. She explained that there were concerns about the Spencer's Rubble Landfill in addition to those previously mentioned. Ms. McClune stated that there were four or five rubble landfill/sanitary landfills that the County was dealing with via citizens' concerns during the 1988-1992 time-frame.

For example, the witness discussed potential concerns with methane gas emissions from the Tollgate Road facility located in Abingdon during that same time frame. Additional concerns were being voiced by citizens at that time regarding similar issues with Spencer's, Oak Avenue, Harford Sands and Gravel Hill as proposed by MRA. She further testified that she was in agreement with the affidavit of former Planning Director William Carroll that there were other types of uses that could be made of the MRA site.

Milton Davenport, Administrator of the Office of Development and Review with the Department of Planning and Zoning, testified next that he had visited the site at least on three occasions since 1996 and that there were no significant changes over the six years other than increased vegetation. He did note that a couple of dump truck loads of concrete and asphalt had been dumped there that must have been dumped between his May, 1999 visit and his May, 2001 visit to the site. He stated that there have been no significant changes since 1957 based on all the aerial photographs that he reviewed. He further stated that approximately 85 percent of the property is forested and that the property is not "like a moonscape."

Subsequently, the following people testified as protestants in this case: Robert Dillon; Donna Hausmann; Jan Stinchcomb; Delores Walke; Winifred Jonas; Ronald Bishop; Violet Hopkins-Tann; Bryan McKay; John P. McCarthy; and Daniel Coates. Three witnesses testified on their own behalf: Robert Dillon (who also testified as one of the protestants); Sylvia Hutsell and Michelle Curry. Mr. Dillon generally testified that from the time period 1987-1991 he and others met with, communicated and wrote to all the Council Members concerning the need for legislation dealing with rubble landfills. He further stated that the Council was aware of the issues dealing with Harford Sands in particular and rubble landfills in general. The PTA was involved and spoke to the Council expressing their concern and the need for county-wide legislation. He also explained that the Council was aware of the Anne Arundel legislation that was enacted for rubble landfills in that county which had a 100 acre minimum and a 1,000 foot buffer requirement. His testimony generally provided information on what was occurring in the County and with the Council during these four years in relation to rubble landfills.

He also testified during that time period, he had prepared a map of the County showing those parcels where the 100 acre minimum could be met. It was his opinion that Bill 91-10 was enacted for and applicable to all rubble landfills.

Donna Hausmann then testified that she lived next to the Oak Avenue Rubble Landfill. She stated that she continually informed each of the Council Members of the problems associated with the rubble landfill and its proximity to her home. She testified that she called the Council Members, spoke to them on many occasions, wrote letters and testified at hearings and at public forums. According to her testimony, this occurred from 1988 through 1991. She stated that she and others spoke to all Council Members concerning issues with rubble landfills in general and Oak Avenue in particular. She further testified that she and many others attended the public hearings on Bill 91-10 and that the majority of the people were in favor of the Bill. She testified that Bill 91-10 was enacted because of the concerns with the Oak Avenue Rubble Landfill that started with the issuance of the permit in 1988 and all the issues raised by many citizens to the Council Members from 1988 to the date of enactment of Bill 91-10. She further stated that she believed the legislation was aimed county-wide because no relief could be afforded the residents surrounding Oak Avenue since it was permitted since 1988 which was before the effective date of Bill 91-10.

Jan Stinchcomb testified next for the protestants and explained that during the time from 1986 on she was very involved with talking to the Council Members about problems, concerns and issues at Spencer's landfill and that she spoke even more to all Council Members from 1988 through 1992, which was before, during and after the enactment of Bill 91-10.

Delores Walke testified next that she started a community involvement process with the County Council, members of her community, and others from 1989 to 1992 when she learned that there was a proposal for a rubble landfill on the MRA site. She testified that she went to the Council meetings and attended the public hearings on Bill 91-10. She voiced her concerns to the Council and was in favor of Bill 91-10. She further testified that other citizens were at the meetings testifying to their concerns about other rubble landfills located elsewhere in the County.

Winifred Jonas testified concerning her involvement with the Council, Bill 91-10 and the MRA site from 1989 through 1991. She also stated her concerns with the involvement of Delegate William Cox and the swift vote on the inclusion of MRA in the Solid Waste Management Plan. The witness stated that between 1989 and 1991 she and her husband attended all Council meetings and public hearings except three or four due to illness or vacation. She stated that the issue of rubble fills and landfills was a topic at nearly every hearing beginning with issues surrounding the Scarborough landfill.

Ronald Bishop testified that he recalled mining taking place on the MRA property in 1949 and from 1956-1959. When he was a child, he recalled that the property was mostly wooded with many animals, streams, springs and two lakes. The last time he was on the site was in 1984/1985. The land at that time was very wooded with many tall trees. He stated that he is a member of the St. James A.M.E. Church. He further testified that there is a historical graveyard adjoining the church that is the burial ground for several Civil War soldiers. This graveyard borders the MRA property and in some cases actually extends into the MRA site. Mr. Bishop testified that he learned of the plans for a rubble landfill in the Spring of 1989. He met the owner, Mr. Schafer, who informed him that he was going to operate a rubble landfill on the adjoining land and that he (Mr. Schafer) wanted to be a good neighbor. He also identified that the church used either a spring or a well on the MRA site for their needs on occasion.

Violet V. Hopkins-Tann, the Pastor of the St. James A.M.E. Church, testified that the Church is 152 years old and that she has been the pastor since 1983. She explained the history of the Church and its relationship with other African Methodist Episcopal churches. She stated that there are at least eight Civil War soldiers buried in the graveyard of the St. James Church cemetery, which was designated as an historic landmark in Harford County in the mid 1990's. She went on to discuss the significance of the graveyard and in particular the graves of the Civil War soldiers and the visitors the cemetery draws.

Reverend Tann explained that she first met Mr. Schafer at her Church after a service during an unannounced visit by Schafer. She also testified that she and other members of her Church were involved with the Council and Bill 91-10. She talked about her on-site visit to the MRA property in November 1998, and referring to photographs taken during that visit, described her surprise at how forested the property was, the amount of vegetation and wildlife, particularly birds. The witness stated that she thought she was going to see a barren landscape and she disagreed with the testimony of Robert Lynch who stated that the property looked like a "moonscape", instead describing what she saw as "marvelous". She felt that a 1,000 foot buffer between the church and a proposed rubble landfill was very reasonable. She testified that the church has been using the spring that Mr. Bishop talked about for over 150 years and that does not require one to enter the MRA property.

Bryan Mackay testified next as an expert in biological science. He visited the MRA site in August 2001 and prepared a report on that basis. He also testified that he visited the site on November 13, 1998. He testified that between the two visits he has seen at least 95 percent of the site. He stated that 95 percent of the site is vegetated and that sand and gravel mining took place about 35 years ago. According to his testimony, less than one acre of the 66 acre site is unvegetated. Mr. Mackay stated that the property in no way resembles a moonscape and that 95% of the property enjoys overhead tree canopy. He further testified that, in his opinion, there has been no mining on the MRA site for 30 to 35 years in his opinion.

John McCarthy was called and admitted as an expert archeologist in the field of evaluating African American historical cemeteries. He stated that he visited the Gravel Hill Cemetery in August 2001. He stated the conditions in the Zoning Code designating the criteria for designating a landmark consistent with such designations throughout the country. He further testified that properties designated as historic landmarks can be delisted if the setting changes and that he had personal knowledge and involvement with delistings that have taken place elsewhere. Also, further study of the actual burial site could be compromised. By continued development of surrounding property, Mr. McCarthy said that a significant boundary between a rubble landfill and historic cemetery is necessary. He further stated that it appears that there are graves that extend into the MRA property, which he could identify from his observation of marker stones located beyond the property line of MRA.

Daniel Coates, a helicopter pilot, testified concerning some pictures he had taken of the MRA site on August 28, 2001. He flew over the area and took the pictures. He described what could be seen of the site and the church.

Robert Dillon attempted to develop facts that would show that any ruling in this case would have legal impact on the Harford Sands operation. Ms. Hutsell testified that the communities surrounding Oak Avenue, Fort Hoyle, Harford Sands and Spencer's were all at the Council meetings on Bill 91-10 and that Council Bill 91-10 was enacted for the benefit of all Harford County citizens and not directed towards MRA. The witness also said that the Maryland Department of the Environment is not concerned with the rights or welfare of citizens.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case has a significant history associated with it beginning in 1988. It is important to understand the historical facts associated with the case in order to understand the current request before the Board. What follows is a procedural and factual history that the Hearing Examiner finds undisputed. Because of the volume of evidence and testimony in the case, the Hearing Examiner has made extensive use of the joint record extract as well as briefs submitted by the Applicant, the County and the Protestants and has adopted much of the language found therein in rendering these findings and decision.

Between 1988 and 1991, five (5) rubble landfills were operational or in the planning stages in Harford County. Spencer's rubble landfill was operating in Abingdon. A proposed rubblefill at Oak Avenue was included in the Harford County Solid Waste Management Plan in 1988 and permitted by the Maryland Department of the Environment during that same year. Another proposed rubble landfill in Joppa, known as Fort Hoyle or Harford Sands [hereinafter "Fort Hoyle/Harford Sands"] was included in the County's 1988 Solid Waste Management Plan as well. A proposed rubble landfill site on Mountain Road in Joppa was in the Phase I permitting process with the Maryland Department of the Environment in 1988. A year later, in 1989, developers proposed building a rubble landfill operation on Gravel Hill Road in Aberdeen. It was asserted that once all of these facilities were fully operational, one-half of the rubble landfills in the State of Maryland at that time, would have been located in Harford County.

During this period residents living in communities adjacent to these sites began to complain to the Harford County Council about their concerns with the number of rubble landfills in the County, and about the negative effect of these facilities, both real and perceived. Residents living near the operating and newly constructed rubblefills complained of noise, dust, vermin, dangerous truck traffic, well contamination and depletion of their well-water. During public hearings and County Council sessions, residents opposed to further proliferation of these rubblefills and their adverse impacts packed Council Chambers, often overflowing out of the hearing room into hallways. Residents from throughout the County offered lay and expert testimony and technical and

scientific documents describing the potential effects of rubble landfills, and advocated strongly in favor of providing protections to communities in close proximity to such facilities. The Gravel Hill proposed rubble landfill was, like all of the proposed rubble landfill sites during this period, a hotly debated issue in the County. Gravel Hill is a predominantly African-American community that has been in existence for at least 150 years. It is a residential community made up of single family homes. Gravel Hill Road provides the only entrance and egress to the community. The road is paved with no shoulder, and no sidewalks.

At the center of the Gravel Hill community is the St. James African Methodist Episcopal Church. The Church is 152 years old. It remains an active church with over 100 members. The pastor of the Church is the Rev. Violet Hopkins-Tann. The St. James AME Church is surrounded on two sides by a cemetery. The portion of the cemetery that lies closest to Gravel Hill Road is an active one. Further back lies an older cemetery. That cemetery contains the remains of at least 8 black Civil War soldiers and as a result, the cemetery was designated as a Harford County historic landmark in 1995. The Church and all of the residences in Gravel Hill are dependent solely on well water. The outer boundary of the MRA property lies 25 feet from the Church's property line and an expert archeologist testified that historical graves of black Civil War soldiers lie beyond the Church property onto the MRA property.

About one-quarter (1/4) mile from the Gravel Hill community is Webster Village. This community is larger than Gravel Hill. It is also made up of single-family homes. The residents of Webster Village are also dependent on well water.

In late August 1989, the Applicant, Richard Schafer, President of Maryland Reclamation Associates (MRA), signed a "Letter of Understanding to Purchase" 55 acres of property on Gravel Hill Road. The St. James AME Church is the adjacent property.

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On September 5, 1989, MRA entered into a Contract to purchase the property. In that Contract, Richard Schafer agreed to pay a $10,000.00 down-payment for the purchase of the property by September 10, 1989. The Contract anticipated the closing date for the purchase as November 5, 1989 and the purchase price was in excess of $730,000.00. In September, 1989 MRA approached representatives of Harford County to discuss the possibility of building a rubble landfill on Gravel Hill Road. MRA formally asked the County to include its rubble landfill plan in the 1989 County Solid Waste Management Plan on September 14, 1989. Two other rubble landfills, Oak Avenue and Harford Sands, had been included in the County's Solid Waste Management Plan in 1988, a year before. Portions of the MRA property had been mined since the mid-1950s, pursuant to a surface mining permit issued by the State. That permit authorizing mining activity, however, pertained to only 7.39 acres of the site. Very little mining activity has taken place on the site during the past 25-30 years. That permit authorizes the internment of broken concrete, tree stumps, brush and, according to the permit, this material must be generated solely by the owner and not from other sources.

By a 4-3 vote, MRA was included in the County Solid Waste Management Plan on November 14, 1989. After the November 14, 1989 hearing, the County and MRA continued to negotiate the terms of the developer's inclusion in the solid waste management plan. At a County Council meeting on February 6, 1990, the Council again debated the terms of the rubblefill's acceptance into the Solid Waste Management Plan. Some community residents including Charlie Vaughn, Ronald Bishop, Delores Walke and Max Hudsell raised concerns about the effect of the landfill on nearby residences.

At some time during this period in February 1990, Council President Jeffrey Wilson informed John Schafer, Richard Schafer's father, and a fellow Council Member, that he planned to take steps to remove MRA from the County Solid Waste Management Plan. MRA purchased the Gravel Hill property on February 9, 1990. On February 13, 1990, the Harford County Council voted to remove MRA from the Solid Waste Management Plan. This action was later found to exceed the County Council's legislative authority. Holmes v. MRA

In the meantime residents continued to complain to the County Council about the effects of the Spencer's rubble fill in Abingdon. The Oak Avenue site had been permitted and residents living near the site complained to the Council about cockroaches that were emanating from the site into nearby homes along Joppa Road.

In March 1991, the Harford County Council enacted legislation designed to deal comprehensively with future rubble landfill siting in the County. That legislation, known as Bill 91-10, imposed zoning restrictions on rubble landfills that were intended to protect adjoining property owners from the noise, dust, vermin and potential water contamination and depletion problems associated with rubble landfill operations. Bill 91-10 required that rubble landfills be constructed in areas in the County in which the developer could maintain a 1,000 foot buffer from the nearest residence. It also required that rubble landfills be constructed on sites of at least 100 acres. The law was modeled in large part on zoning legislation that had been enacted the prior year in Anne Arundel County.

Residents from throughout the County testified before the County Council in favor of this legislation. At two public hearings held by the County Council, the overwhelming number of witnesses testified in favor of the legislation. Expert witnesses offered testimony outlining the potential negative effects of the rubble landfills on surrounding communities.

The law applied to all rubble landfills that had not received permits from MDE at the time of the law's enactment. These included the Fort Hoyle/Harford Sands proposed rubble landfill, as well at the Mountain Road and the Gravel Hill sites.

After learning that the County had enacted Bill 91-10, the Maryland Department of the Environment (MDE), asked MRA and the other developers seeking rubble landfill permits in Harford County at the time to reconfirm that they were still in compliance with all local zoning laws. At this point, the MRA proposed rubble fill did not contain a 1,000 foot buffer from the Gravel Hill Church, nor was the property 100 acres.

Nevertheless, Richard Schafer sent a letter to MDE assuring the agency that the MRA site was still in compliance with local zoning. MDE continued processing MRA's permit application in 1991. The County formally informed MRA on May 2, 1991 that Bill 91-10 applied to its property. The County also applied 91-10 to the Fort Hoyle/Harford Sands rubble landfill site.

MRA received a permit to operate a rubble landfill from the Maryland Department of the Environment on February 28, 1992, nearly a year after the enactment of Bill 91-10. The permit was issued on the express condition that MRA comply with all local land use requirements. In the permit, MDE expressly stated that "[n]othing in this permit authorizes the construction or operation of the facility in violation of zoning, planning, or land use requirements." In the cover letter accompanying the permit, Richard Collins, Director of the Hazardous & Solid Waste Administration at MDE, specifically directed Richard Schafer's attention to that language in the permit.

In the meantime, MRA had filed suit against Harford County challenging the enactment and application of Bill 91-10 and Resolution 15-91 in June 1991. On June 28, 1991, the Circuit Court for Harford County issued an Order enjoining the County from enforcing Bill 91-10 and Resolution 15-91. That order also enjoined MRA from commencing any construction of the rubble landfill without express approval of the Court. On May 19, 1994, the Circuit Court for Harford County found that Bill 91-10 was a constitutional exercise of the County's legislative authority. The Court found that MRA did not have a vested right in the permitting process. The Court found, however, that the County's adoption of Resolution 15-91 was beyond the County's legislative authority. MRA appealed the decision. The County did not cross-appeal the Circuit Court's determination with regard to Resolution 15-91.

Case Nos. 4702 & 4913 – MARYLAND RECLAMATION ASSOCIATES, INC.

In 1996, the Court of Appeals ruled that MRA's claim that Bill 91-10 could not be validly applied to its proposed rubblefill were not ripe for judicial determination because MRA had failed to pursue available administrative remedies. MRA Associates, Inc. v. Harford County, Maryland, 342 Md. 476, 677 A.2d 567 (1996). The Court of Appeals specifically identified MRA's right to seek a variance from the County's attempt to apply Bill 91-10 to its proposed site on Gravel Hill Road as an appropriate administrative remedy that must be exhausted before MRA seeks judicial determination of its claims.

In obvious response to the decision of the Court of Appeals, on November 15, 1996, MRA posed its first request for interpretation to Harford County. MRA's letter requested that the Zoning Administrator interpret the Zoning Code as to the following four questions, which questions were expressly discussed by the Court of Appeals in MRA at page 501:

1. **Whether Bill 91-10 applies to MRA's property on Gravel Hill Road?**

2. **Whether the requirements of Bill 91-10 can be validly applied to MRA's property on Gravel Hill Road under the circumstances of this case and in light of the Environmental Article of the Maryland Code as well as other principles of Maryland law?**

3. **Whether MRA's operation of a rubble landfill on its property at Gravel Hill Road pursuant to its State permit will be deemed to violate applicable Harford County Zoning?**

4. **Whether MRA can obtain the Grading Permit (No. 92-123) for which it has already applied and paid for and which has not yet been issued without obtaining a variance from Bill 91-10?**

After an initial refusal to respond, the Zoning Administrator eventually responded to this request for interpretation by letter dated February 18, 1997, stating that Bill 91-10 was applicable to MRA's proposed rubble landfill. MRA timely noted an appeal on March 7, 1997 from the Zoning Administrator's February 18, 1997 decision, requesting an interpretation from the Board of Appeals as to whether the Zoning Administrator was correct in her findings as stated in her February 18, 1997 opinion letter. The basis for MRA's position that the Zoning Administrator was incorrect in her interpretation was set forth in detail in the appeal and included constitutional, preemption, estoppel and non-conforming use issues.

In its appeal, MRA specifically requested that the Board of Appeals address each of its legal basis for its assertion that the Zoning Administrator's February 18, 1997 decision was incorrect.

Harford County later filed a motion to dismiss a portion of MRA's March 7, 1997 appeal, stating that the Board was not permitted to consider any of the legal basis raised by MRA in its assertion that the Zoning Administrator's decision was incorrect. The Hearing Examiner ruled that to the extent the legal issues raised by MRA were relevant to the issues decided by the Zoning Administrator, specifically that Bill 91-10 applied to MRA, they could be considered. To the extent they were independent questions to be posed for the first time to the Board of Appeals, the Board could not consider them.

MRA filed a request for a zoning certificate on December 29, 1998. MRA also filed a second request for interpretation to the Zoning Administrator on December 10, 1998, raising five questions for review. The five questions were:

1. **Whether MRA's operation of a rubble landfill on its property at Gravel Hill Road pursuant to its State-issued Refuse Disposal Permit No. 92-12-35-10-D and as renewed by Refuse Disposal Permit 1 996-WRF-05 17 will be deemed to violate applicable Harford County zoning?**

2. **Whether Harford County is prohibited by the principles of estoppel from applying the provisions of Harford County Bill 91-10 (Section 267-40.1 of the Harford County Code) to MRA's property and specifically, to MRA's operation of a rubble landfill on its property pursuant to its State-issued permit referenced in Question 1?**

3. **Whether applying the provisions of Bill 91-10 to MRA's property and specifically, to MRA's operation of a rubble landfill on its property, is prohibited by the United State's Constitution and/or the Maryland Declaration of Rights?**

4. **Whether Harford County is preempted by the Environmental Article of the Maryland Annotated Code, including but not limited to Sections 9-20 1 et seq. and 9-50 1 et seq. and applicable regulations promulgated thereto from applying the provisions of Bill 91-10 to MRA's property, and specifically, to MRA's operation of a rubble landfill on its property pursuant to its State-issued permit referenced in Question 1?**

5. Whether MRA's operation of a rubble landfill on its property pursuant to its State-issued permit referenced in Question 1 is a valid non-conforming use pursuant to the Harford County Zoning Code?

The Zoning Administrator responded to both the request for a zoning certificate and second request for interpretation by letter dated February 22, 1999. In that letter, the request for a zoning certificate was denied because of alleged failures to comply with various County buffers and Question Nos. 1 and 5 above, only, were answered by the Zoning Administrator. MRA timely appealed the February 22, 1999 decision of the Zoning Administrator.

On August 30, 2000, all parties moved to remand the consolidated appeals to the Zoning Administrator for the limited purpose of having the Zoning Administrator respond to Question Nos. 2, 3 and 4 raised in MRA's December 10, 1998 Request for Interpretation. On October 4, 2000, the Director of Planning and Zoning for Harford County, Joseph Kocy, in his capacity as Zoning Administrator, responded to Question Nos. 2, 3 and 4 raised in MRA's December 10, 1998 Request for Interpretation. While the October 4, 2000 decision was expressly deemed to be part of the original denial of the zoning certificate, apparently out of an abundance of caution, on October 18, 2000 MRA noted an appeal of the Zoning Administrator's decision of October 4, 2000. A series of administrative hearings before the Hearing Examiner commenced on January 22, 2001 and concluded with the last hearing being held on October 1, 2001.

III. APPLICABLE STATUTES

Harford County Code Section 267-40.2 Rubble landfills. [Added by Bill No. 91-10; amended by Bill No. 97-12]

"A rubble landfill may be permitted in the AG, RR, RI, R2, R3, R4, RO, VR, VB, BI, B2, B3, CI, and GI Districts only if:

A. The site is at least one hundred (100) acres in size;

B. This site has a buffer that satisfies the requirements of Section 267-28D(4) of this chapter;

C. All areas in which solid waste is deposited are at least five hundred (500) feet from the Floodplain District established by Chapter 131 of this Code;

D. Notwithstanding Section 267-28D(4) of this chapter, all areas in which solid waste is deposited are at least one thousand (1,000) feet from any lawfully permitted off-site residential or institutional building;

E. The rubble landfill is contoured to substantially conform to the original grade of the site and, in any case, the height of the landfill does not exceed the height of the tallest structure or natural feature within two thousand five hundred (2,500) feet of the parcel."

Harford County Code Section 267-41. Natural Resources District. [Amended by Bill Nos. 85-12; 88-22]

D. Natural Resources District.

(1) Purpose. The intent of this overlay district is to preserve significant/special environmental features identified herein and to:

(a) Provide uniform guidelines for orderly development and use of land within the Natural Resources District to protect the ecology of the area.

(b) Protect steep terrain.

(c) Protect water quality in streams and rivers.

(d) Minimize erosion/siltation and protect essential vegetation.

(e) Protect nontidal wetlands.

(f) Protect persons and property from environmental hazards such as erosion, siltation and floodwaters.

(2) Application. The Natural Resources District shall apply to the following environmental features:

(a) Steep slopes: any land area exceeding forty thousand (40,000) square feet with a slope in excess of twenty-five percent (25%).

(b) Marsh areas: any area of nontidal wetlands exceeding forty thousand (40,000) square feet, including but not limited to areas designated as "areas of critical state concern" by the Maryland Department of State Planning. The Natural Resources District boundaries under this provision shall include the buffers described in Subsection D(5)(e) below.

(c) Streams: the following streams, including Broad Creek, Bynum Run, Carsins Run, Deer Creek, Grays Run, Ahha Branch, Herring Run, Little Gunpowder Falls, Rock Run, Peddler Run, Swan Creek, Winters Run and their tributaries, as identified on the Harford County Hydrology Map (1976 Revised Maryland Geological Survey Base Map 1:62,500). Tributaries to the above streams which drain a sub-basin of more than four hundred (400) acres are included in the Natural Resources District stream designation. The acreage of a sub-basin is determined at the point of confluence with another stream identified on the County Hydrological Map. The Natural Resources District area for stream protection shall be a minimum distance of one hundred fifty (150) feet on both sides of the center line of the stream or fifty (50) feet beyond the one-hundred-year floodplain, whichever is greater, and along their tributaries for a minimum of seventy-five (75) feet on both sides of the center line of the tributary. The Natural Resources District boundaries under this provision shall include the buffer requirements of Subsection D(4)(b) and (5)(b) of this section.

(3) Use restrictions. The following uses shall be prohibited:

(a) Mining or excavation, except existing operations of either, and dredging, except such dredging as may be permitted by state law.

(b) Deposit or landfills of refuse or solid or liquid waste, except manure. Acceptable fill permitted by the United States Army Corps of Engineers may be used for stream bank erosion control.

(c) Alteration of the streambed and bank of a waterway, except for best management practices to reduce stream erosion and maintenance of stream crossings for agricultural purposes.

IV. DISCUSSION

MRA bases its appeal on five claims:

I. that MRA has a vested right in its plans for the Gravel Hill property;

II. that the enactment of Bill 91-10 was an arbitrary and capricious use of local government power designed to target MRA;

III. that the doctrine of zoning estoppel prevents the County from applying the requirements of 91-10 to MRA and;

IV. that the County is preempted by the State from enacting or applying 91-10.

V. that the provisions of sections 267-18 and 267-20 of the Harford County Code exempt the MRA site from the provisions of Bill 91-10 as a legal non-conforming use.

I. HAS MRA ESTABLISHED THAT IT HAS A VESTED RIGHT IN THE CONSTRUCTION OF A RUBBLE LANDFILL ON GRAVEL HILL ROAD?

In Maryland, it is possible for a landowner to obtain a "vested right" in a use on his/her property that will constitutionally protect that use against a subsequent change in the zoning ordinance prohibiting or limiting that use. Feldstein v. LaVale Zoning Board, 267 Md. 204, 210, 227 A.2d 731 (1967); quoted in Richmond Corp. v. Board of County Comm'rs for Prince George's County, 254 Md. 244, 255 A.2d 398 (1969), and Prince George's County v. Sunrise Development Limited Partnership, 330 Md. 297, 623 A.2d 1296 (1993).

A property owner's right to engage in a particular activity on his land vests when the owner "obtains a permit or occupancy certificate ....and (2) proceeds under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use." Rockville Fuel and Feed Co. v. City of Gaithersburg, 266 Md. 117, 124 (Md. 1972) citing Richmond Corp. v. Board of County Commr 's for Prince George's County, 254 Md. 244, 255 (Md. 1969). Stated a little differently, Maryland Courts have consistently held that there are three threshold requirements that must be established in order to obtain vested rights:

1. **there must be the actual physical commencement of some significant and visible construction,**

2. **the commencement must be undertaken in good faith, to wit, with the intention to continue with the construction and to carry it through to completion, and**

3. **the commencement of construction must be pursuant to a validly issued permit, Sykesville v. West Shore Communications, Inc., 110 Md. App. 300, 677 A.2d 102 (1996).**

In addition, establishing a vested right in the state of Maryland also requires that, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, [the land owner] has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations." Rockville Fuel, 266 Md. at 125, citing Ross v. Montgomery County, 252 Md. 497, 506 (Md. 1969).

The Fourteenth Amendment of the United States Constitution and Article 24 of Maryland's Declaration of Rights provide procedural and substantive protection for property interests.

> **"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understanding that secure certain benefits and that support claims of entitlement to those benefits."**

In reliance on National Waste Managers, Inc. v. Anne Arundel County, 135 Md. App. 585, 763 A.2d 264 (2000), cert. Denied, 363 Md. 659, 770 A.2d 467 (2001), Applicant argues that a developer seeking to establish a rubble landfill is not first required to obtain a "permit" in order to acquire vested rights in the rubble landfill permitting process. In that case a developer sought administrative approval from Anne Arundel County for a special exception and variance to operate a rubble landfill. At about the same time as it began the special exception process with Anne Arundel County, it began the permit process with the MDE. In 1993 the developer received special exception approval which was appealed. In 1994 the MDE suspended process of the developer's rubble landfill permit application (which was at that time in Phase Three of MDE's permit approval process) pending receipt from the County of a statement that the proposed rubble landfill satisfied County zoning and was in conformity with the County's Solid Waste Management Plan. Id. at 267. In 1997, Anne Arundel County issued a Statement of Conformance to the MDE stating that the applicant conformed with the Solid Waste Management Plan and County Zoning.

Shortly thereafter, while appeals of various County contempt orders and other related issues were pending in the courts, the County informed MDE that the developer's special exception had expired by operation of law. The Court of Special Appeals held that the County's two year time period within which a special exception would automatically lapse was tolled during the entire course of litigation regarding the rubble landfill.

The Hearing Examiner finds this reliance misplaced. In National Waste, the permit process was suspended until, in 1977 the County informed MDE that all zoning requirements were met. When the County contended that the Special Exception grant had expired prior to the permit process being finished, the Court recognized in its holding that a County government could effectively stop any State permit process by delaying tactics that result in expiration of special exceptions or variances. In fact, the Court stated that, "the regulatory process is not designed to be a spider's web, snaring one who follows all the regulations and statutes, obtains all the necessary permits, and successfully defends a series of appeals, but then loses the right to proceed because the passage of time has caused the permits to expire." National Waste at 278. Thus the Court concluded that the Applicant in National Waste, had acquired a vested right in the permitting process and that the expiration period of the special exception approval had tolled during the pendency of litigation between the parties.

In the instant case, however, the permitting process cannot move forward at all at the State level until the Applicant has obtained zoning approval. In fact, in this case, MDE, after the passage of Bill 91-10, by letter, asked MRA to certify its continued compliance with Harford County Zoning Law. Despite the passage of Bill 91-10, Mr. Schafer, for MRA, responded in the affirmative. The permit was issued on the basis that MRA complied with Harford County Zoning Law. Presumably, had Schafer responded negatively to the inquiry of MDE, the permitting process would have stopped there and then.

Supporting this contention is MDE's letter dated May, 1991, wherein Richard Collins, Acting Director of the Hazardous and Solid Waste division at MDE, informed County Council President Jeffrey Wilson that the agency would continue to process MRA's permit application, based on the developer's assurance to the agency that it was still in compliance with local zoning, stating:

> **"At this point in time, the applicant has submitted the necessary information regarding conformance with the County Solid Waste Management Plan, and local zoning and land use. Please note that the Maryland Code does not require the Department to determine whether the landfill is in conformance with local zoning laws. *All that is required on that point is a statement from the applicant. That statement has been received so we are proceeding forward with the permit application process*." JRE Vol. 2 of 4 at E-859 (emphasis added).**

In any event, the process of permitting the MRA use continued and a permit was issued some 11 months after the passage of Bill 91-10. It can hardly be claimed that an after issued permit acts to create vested rights in a use occurring prior to the permit issuance. Under any stretch of imaginative interpretation of Maryland law, one of the elements establishing vested rights is the actual obtainment of a permit and not the mere application therefore.

MRA's novel argument is that its rights vested by the time it entered Phase II of the permitting process. This is an entirely insupportable argument. Vested rights are not triggered by mere application for a permit. The permit must in fact issue in order for rights to vest. An Applicant obtains no vested rights by the mere application for a permit and certainly an Applicant that proceeds to obtain a permit based on his own misinformation should not be entitled to claim vested rights.

The second hurdle that MRA must meet is to prove that it has proceeded with the use, commencing the activities normally associated with a rubblefill operation. MRA cannot meet the second prong of the vested rights test. The Maryland Court of Appeals has stated that in order to obtain a vested right in a pre-existing zoning use that is constitutionally protected against a subsequent change in the zoning laws, the property owner must "proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use." Sycamore Realty Co., Inc. v. People 's Counsel of Baltimore County, 344 Md. 57, 67 (Md. 1996) quoting Prince George 's County v. Equitable Trust, 44 Md. 272, 278 (Ct. Spec. app. 1979). This test requires both reliance and notice. he Court of Appeals of Maryland has also stated that to have vested right there must be "a manifest commencement of some work or labor on the ground which everyone can readily see and recognize as the commencement [of the undertaking] and the work must have been begun with the intention and purpose then formed to continue the work until the completion of the building." Prince George's County, Md v. Sunrise Development Ltd. Partnership, 330 Md. 297, 307 (Md. 1993) citing Rupp v. Earl H. Cline & Sons, 230 Md. 573 (Md. 1963).

In the case at hand, the requirement of actual construction cannot be met. MRA has not engaged in any construction of the rubble fill on the property. In fact, MRA has been enjoined from doing so. Richard Schafer, the president of MRA, conceded in his testimony that he has not commenced construction of a rubble fill on the property.

The Applicant also contends that it has acquired vested rights because it has expended substantial amounts of money in reliance on its property being placed in the Solid Waste Management Plan. A landowner who has a valid permit may also be able to invoke vested rights if "they have incurred substantial expense in reliance on the permit." Ross v. Montgomery County, 252 Md. 497, 504 (Md. 1969). MRA argues that the cost of purchasing the property and applying for the permit constitutes "substantial expense" that justifies its claim of vested rights. Richard Schafer testified that he incurred substantial expenses in preparing the studies, surveys and information needed for the Phase II and Phase III portions of MDE's permitting process.

But Maryland law does not support the contention that the purchase of property, or expenses incurred in obtaining the permit in reliance upon a zoning classification four years before a permit is issued can satisfy the "substantial expense in reliance on the permit" requirement. Nor does Mr. Schafer's speculation that he stood to make $35 million (net) from the operation of a rubblefill on Gravel Hill Road, satisfy this proving of the vested rights test. The kind of expenses that supports a claim of vested rights are those associated with constructing the facility to which the permit is directed. In Ross v. Montgomery County, 252 Md. 497 (Md. 1969), despite the alleged high price paid for the property based on its then-authorized use as an apartment hotel, and expenditures of $56,000 by the property owners in architect's services, the Court of Appeals ruled that the owner had not acquired a vested right to the building permit because he had not in good faith begun actual construction. Id. at 503. In County Council for Montgomery County v. District Land Corp., 274 Md. 691, 707 (Md. 1975), the Court ruled that the fact that a landowner spent more than one million dollars in studies and plans for development of property and that a valid building permit was issued did not give the owner a vested right in the zoning classification which the property had enjoyed at the time of purchase.

In both Prince George 's County, Md. v. Sunrise Development Ltd. Partnership, 330 Md. 297 (Md. 1993) and Richmond Corp. v. Board of County Commr's for Prince George's County, 254 Md. 244 (Md. 1969), the property owners had expended large sums of money ($4,000,000 and $2,150,845, respectively) in acquisition of property and in hiring architects and preparing plans and leases. In both cases, despite the Court's acknowledgment that these were substantial expenditures, the Court refused to hold that a vested constitutional right was created, given the absence of actual work on the property itself. In sum, money expended in the purchase of the property, or on engineering plans, has not been regarded by Maryland appellate courts as the kind of expenses that trigger vested rights.

The Hearing Examiner concludes that the Applicant does not have a vested right in the construction of a rubble landfill at its Gravel Hill location.

II. Was Enactment of Bill 91-10 an Arbitrary and Capricious use of Local Government

Power Designed to Target MRA?

MRA claims that Bill 91-10 was enacted solely to prohibit it from operating its rubble landfill at the Gravel Hill site. However, the extensive record in this case makes it clear that at the time of the enactment of Bill 91-10, the Harford County Council was dealing with a citizenry outraged and outspoken about the numerous adverse impacts associated with rubble landfills and landfills in general. Council meetings and public hearings were well attended, often to overflowing with citizens appearing in opposition to, not one, but five landfill operations either operating or proposed. The local newspaper reported on the numerous citizen complaints regarding these operations which included cockroach infestation, truck traffic and associated noise, dust, and odors. Faced with such an outpouring of citizen concern demanding action by the County Council, it is not surprising that after months of hearings, debate and study, the Council enacted legislation on an emergency basis to further regulate and control rubble landfill operations in Harford County.

The legislation is not targeted specifically at MRA but applies county-wide to all rubble landfills desiring to operate after enactment of Bill 91-10. In fact, testimony of Robert Dillon indicates that Bill 91-10 may already have impacted directly on a rubble landfill known as Harford Sands. In any event, the enactment of zoning laws is well within the purview of the Harford County Council and is consistent with the County Charter and the Express Powers Act of the Maryland Constitution. The Bill itself is a reasonable attempt by the Council to extend buffers between rubble landfill operations and nearby residential uses. It accomplishes this by requiring certain minimum lot sizes and minimum buffer zones that, in its opinion, the Council believed would reasonably address the impacts associated with these operations. While the Applicant made much of the status of Bill 91-10 as "Emergency Legislation", the Applicant ignores the issues of four other landfill operations that were squarely before the County Council at the time of its enactment.

Clearly the pendency of the MRA permit gave some impetus to immediate enactment of a relief statute; however, this was not the only landfill operation that vexed the Council at that time.

As already discussed herein, the Applicant's use acquired no vested rights, a legal status that would have provided the constitutional protection from the impact of later enacted statutes like Bill 91-10. The Hearing Examiner can find no basis for a determination that the enactment of Bill 91-10 and its application to MRA's Gravel Hill operation was arbitrary or capricious or in any way outside the valid and legitimate exercise of the Council's legislative authority.

III. Is Harford County Precluded from Applying the Provisions of Bill 91-10 to MRA Pursuant to the Doctrine of Zoning Estoppel?

The Hearing Examiner notes at the onset, and this point is conceded by all of the parties, that Maryland, unlike other jurisdictions, has not expressly adopted the theory of zoning estoppel. However, the Maryland Courts have consistently recognized that the theory of "vested rights" is an estoppel theory. Relying on Rockville Fuel, the Applicant argues that, (1) it has vested rights in its use as a rubble landfill and, (2) the County amended the zoning ordinance for the purpose of prohibiting MRA from operating a landfill. MRA's argument fails on both counts. First, as discussed herein, MRA has no vested rights in its use. Secondly, it is not the law in Maryland that an administrative body or a court for that matter, shall examine the motives of the legislature in enacting laws and ordinances that, are on their face, legitimate exercises of legislative power.

The Applicant argues that Council Bill 91-10 was enacted solely for the purpose of preventing MRA from operating its rubble landfill. However, as discussed above, the record is replete with evidence and testimony that at least 5 landfill operations were of significant concern at the time of passage of 91-10. Citizens from all over Harford County appeared before the Council and voiced legitimate concerns concerning both existing and proposed landfill and rubble landfill operations.

Expert testimony was taken regarding the impacts of such operations on adjacent neighborhoods. Impacts such as dust, vermin, noise, traffic, odors, well water issues were all brought forward as general objections to such operations and were not targeted only at MRA's proposed use but at all future landfill operations in Harford County. It is not unusual or out of the ordinary for zoning codes to impose certain buffer requirements, minimum land size and similar restrictions on certain uses in an attempt to legislatively mitigate these known impacts. Bill 91-10 applies to all rubble landfill operations in Harford County and appears in all ways consistent with the legitimate power of the legislative body.

Maryland has consistently followed the doctrine that zoning is a legislative function, and a Court's review of the acts of a zoning authority is restricted to determining only whether the zoning action was arbitrary, discriminatory or illegal; a Court may not substitute its judgment for that of the zoning authority if its decision is based on substantial evidence and the issue is fairly debatable. MontgomeryCounty v. Woodward & Lothrop, Inc., 376 A.2d 483, 280 Md. 686, cert denied Funger v. Montgomery County, Maryland, 98 S. Ct. 1245, 434 U.S. 1067, 55 L.Ed. 2d 769 (1977).

The Applicant argues that it expended significant sums of money in reliance on the inclusion of the MRA's Gravel Hill site in the Solid Waste Management Plan. Therefore, the County is estopped from applying the provisions of Bill 91-10 which, according to the Applicant, operates to prevent its operation of a landfill on the subject site. The Applicant ignores two important and relevant facts. First, the inclusion of a site and proposed rubble landfill in the Solid Waste Management Plan does not, by itself, grant an Applicant the final authority to operate that use at that site. The State application process could fail at any time. Secondly, while the Applicant argues the preclusive nature of the provisions of Bill 91-10, it ignores the possibility that a variance could be sought by MRA and possibly obtained. It is unknown whether MRA could meet the requirements for a grant of the necessary variances, however, it is very clear that nothing in Bill 91-10 or current Harford County law prevents the Applicant from seeking the variances necessary to bring it into compliance with local zoning law. MRA has, as of this date, declined to seek such relief.

The Hearing Examiner concludes that Harford County is not precluded from applying the provisions of Bill 91-10 to MRA based on the doctrine of zoning estoppel.

IV. Is Harford County Law Preempted by State Law?

Applicants argue that the application of Bill 91-10 is preempted by State law, specifically the Maryland Environmental Article and applicable regulations.

Applicant argues that the application of Bill 91-10 to MRA, given the fact that the County's planning role in the rubble landfill permit issuing process was finished, is tantamount to allowing Harford County, not the State of Maryland, to have absolute control over the rubble landfill permit issuing process. While it is generally true that County law or regulation which has the effect of vetoing a State-issued permit is preempted by State law, that is not the case here. Bill 91-10 was enacted prior to the issuance of the State permit -- not after. MDE has not preempted the application of zoning laws to rubble landfills and indeed, as part of the specific requirements to obtain a permit to operate a rubble landfill, an Applicant is required to attest to compliance with local zoning laws. It can hardly be presumed that a State law that requires compliance with local law has preempted that local law. In fact, just the opposite conclusion is reached in such cases where a State law specifically requires compliance with a local zoning law and, thus, specifically rejects any notion of preemption on the face of the statute.

The Hearing Examiner concludes that Harford County law, specifically Bill 91-10 is not preempted by State law.

V. Does MRA have a legal nonconforming use to operate a Rubble Landfill at the Gravel Hill Site?

The Applicant contends that MRA has a legal non conforming use to operate a rubble landfill because of its earlier issued industrial waste permit. The argument is specious and ignores the provisions and nature of the permit itself as well as established principles of zoning law.

If, within the zoning districts, there exists uses of land which were lawful prior to

enactment of this Part 1 or subsequent amendments and which would not conform to the regulations and restrictions under the terms of this Part 1 or amendments thereto or which could not.., used under this Part 1, such non-conformity's may continue to exist subject to the regulations contained in [Article IV, Nonconforming lots, buildings, structures and uses].

Harford County Code Section 267-20 provides in pertinent part:

"Nonconforming buildings, structures and uses.

Nonconforming buildings, structures or uses may be continued, subject to the following provisions:

A. No nonconforming use shall be changed to a use not permitted by this Part 1 in the particular district in which the building or structure is located, except:

....(2) Whenever a nonconforming use has been changed to a more-restricted use, such use shall not thereafter revert to a less-restricted use.

(3) When authorized by the Board, one nonconforming use may be substituted for another nonconforming use.

....C. In the event that a nonconforming use ceases for a period of one (1) year or more, then the nonconforming use shall be deemed abandoned, and compliance with this Part 1 shall be required. The casual, temporary or illegal use of land or structure does not establish the existence of a nonconforming use.

An industrial waste permit was issued which permitted the deposit of limited types of rubble waste on portions of the MRA property (consisting of about 24 acres) by a single generator. That permit authorized only the disposal of broken concrete and tree stumps from land clearing and excavation activities undertaken by Johnson Construction Company. The operation of a rubble landfill was never a permitted use of the site.

On or about April 10, 1990, industrial waste management permit No. 85-IW-0016 was transferred from M. K. Coale to MRA. Again, the transferred permit that was issued to MRA authorized only the disposal of concrete, brush and tree stumps from land clearing and excavation activities. Under the transferred permit, waste generated by Johnson Construction Company no longer could be deposited at the site. Only waste generated by MRA could be deposited at the site. By letter dated January 14, 1992, MDE clarified the very limited scope of the source of waste which could be deposited at the site under then expired industrial waste management permit. Specifically, MDE advised MRA that only waste generated by an individual or a single corporation or business could be deposited at the site pursuant to that permit.

The Applicant does not have a valid non-conforming use by virtue of its earlier issued permit. That permit is limited in scope to types of waste allowed, a single source only and a very limited acreage. Moreover, even if one could assume there once existed a valid non-conforming use, there was no evidence presented of a continued use of the property under the terms of that permit. Witnesses that visited the site testified that there had been no recent use of the property that was visible. MRA has not produced any evidence that it maintains any equipment capable of conducting mining operations or the excavation, transport and handling of stumps, brush and broken concrete. When a nonconforming use has ceased for a period of one or more years, that nonconforming use is deemed abandoned (Harford County Code Section 267-20C).

In the opinion of the Hearing Examiner, MRA does not have a valid non-conforming use entitling it to operate rubble landfill on this site.

V. CONCLUSION

On November 15, 1996, MRA posed four questions to the Zoning Administrator in its first request for interpretation. Then, on December 10, 1998, five additional questions were presented to the Zoning Administrator in a second request for interpretation. Two appeals from the opinion of the Zoning Administrator were file, namely Cases 4702 and 4913, which were consolidated for purposes of efficiency. The Hearing Examiner has above, discussed each of the legal issues raised by the Applicant in its prior requests. In conclusion and for clarity each of the questions posed to the Zoning Administrator is specifically, and for the reasons already extensively discussed herein, answered as follows:

1. ***Whether Bill 91-10 applies to MRA's property on Gravel Hill Road?***

The Hearing Examiner agree with the Zoning Administrator and concludes, for the reasons previously discussed herein, that Bill 91-10 applies to MRA's property on Gravel Hill Road.

2. ***Whether the requirements of Bill 91-10 can be validly applied to MRA's property on Gravel Hill road under the circumstances of this case and in light of the Environmental Article of the Maryland Code as well as other principles of Maryland law*?**

The Hearing Examiner agrees with the Zoning Administrator and concludes, for the reasons previously discussed herein, that applying the provisions of Bill 91-10 to MRA's property on Gravel Hill Road is a valid exercise of the legislative authority with which the Harford County Council is empowered.

3. Whether MRA's operation of a rubble landfill on its property at Gravel Hill Road pursuant to its state permit will be deemed to violate applicable Harford County zoning?

The Hearing Examiner concludes, for reasons previously discussed herein, that operation of MRA's rubble landfill at the Gravel Hill site will violate applicable Harford County Zoning Law, particularly Harford County Code Sections 267-40.1, 267-28C, 267-28D(4) and 267-41. Moreover, the Hearing Examiner questions whether the permit issued to MRA by MDE is validly issued as it was based on misinformation provided to the State by MRA regarding the conformance of the property and use with Harford County Zoning Law.

4. Whether MRA can obtain the grading permit (No. 92-123) for which it has already applied and paid for and which has not yet been issued without obtaining a variance from Bill 91-10?

The Hearing Examiner concludes, for the reasons previously discussed herein, that MRA cannot obtain a grading permit unless it can meet the requirements of Harford County Zoning Law. To the extent MRA does not meet specific standards it must seek a variance and obtain a variance from provisions with which it cannot comply. MRA's reliance on site plan approvals that pre-date the enactment of Bill 91-10 is without merit.

5. Whether MRA's operation of a rubble landfill on its property at Gravel Hill Road pursuant to its State-issued Refuse Disposal Permit No. 92-12-35-10-D and as renewed by Refuse Disposal Permit 1 996-WRF-05 17 will be deemed to violate applicable Harford County zoning?

The Hearing Examiner concludes, for the reasons previously discussed herein, that Harford County Zoning laws prohibit the operation of the MRA property as a rubble landfill pursuant to the disposal permits referenced above.

6. Whether Harford County is prohibited by the principles of estoppel from applying the provisions of Harford County Bill 91-10 (Section 267-40.1 of the Harford County Code) to MRA's property and specifically, to MRA's operation of a rubble landfill on its property pursuant to its State-issued permit referenced in Question 1?

The Hearing Examiner concludes, for the reasons previously discussed herein, that Harford County is not precluded under a theory of zoning estoppel, from applying the provisions of Bill 91-10 to the MRA's Gravel Hill site.

7. Whether applying the provisions of Bill 91-10 to MRA's property and specifically, to MRA's operation of a rubble landfill on its property, is prohibited by the United States Constitution and/or the Maryland Declaration of Rights?

The Hearing Examiner concludes, for the reasons previously discussed herein, that MRA's rubble landfill did not acquire vested rights in its use that would insulate it from the application of Bill 91-10 to that use. It is the vested rights doctrine itself that allows a landowner to raise issues of constitutional protections. In short, there can be no constitutional infringement on the rights of a landowner absent that landowner's establishment of vested rights in the use. As discussed further herein, enactment of Bill 91-10 and applying it to the MRA's Gravel Hill site was a legitimate exercise of the legislative power and was not arbitrary, capricious or discriminatory.

8. Whether Harford County is preempted by the Environmental Article of the Maryland Annotated Code, including but not limited to Sections 9-20 1 et seq. and 9-50 1 et seq. and applicable regulations promulgated thereto from applying the provisions of Bill 91-10 to MRA's property, and specifically, to MRA's operation of a rubble landfill on its property pursuant to its State-issued permit referenced in Question 1?

The Hearing Examiner concludes, for the reasons previously discussed herein, that the application of Bill 91-10 to the MRA's Gravel Hill site is not pre-empted by State Law.

9. Whether MRA's operation of a rubble landfill on its property pursuant to its State-issued permit referenced in Question 1 is a valid non-conforming use pursuant to the Harford County Zoning Code?

The Hearing Examiner concludes, for the reasons previously discussed herein, that MRA's operation of rubble landfill on its property is not a valid non-conforming use.

Date: APRIL 2, 2002

William F. Casey
Zoning Hearing Examiner